

Furr's, Inc. and United Food and Commercial Workers International Union, Local No. 663, AFL-CIO, Petitioner. Case 16-RC-8347

December 16, 1982

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held July 9, 1981,¹ and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Hearing Officer's findings² and recommendations only to the extent consistent herewith.

The Hearing Officer recommended that Objection 2 be sustained in part and that the election be set aside based on a misrepresentation of law by the Employer 2 days before the election.³ We disagree.

The alleged misrepresentation involves statements made by the Employer's industrial relations director, Weaver, at an employee meeting on the morning of July 6, 1981. Crediting the testimony of union witnesses, the Hearing Officer found that Weaver stated that the Employer possessed the economic right to "invoke" joint negotiations with Safeway, another retail food employer in the area.⁴ Based on Weaver's statement, the Hearing Officer concluded that Weaver had materially misrepresented the law regarding the formation of a multiemployer bargaining unit by failing to state that the Petitioner would have to consent to such a bargaining arrangement. Further, relying on Weaver's own testimony that he stated to employees, "[I]f they [the Union] strike Safeway, we lock you out, and if they strike Furr's, Safeway locks out," the Hearing Officer found that Weaver's statement

caused employees to think about the actions the Petitioner might take against Safeway as well as the action it might take against their own employer. The Hearing Officer further concluded that, because of its erroneous premise regarding joint negotiations, Weaver's prediction of a possible lock-out was not privileged. Finally, applying *Hollywood Ceramics Company, Inc.*,⁵ the Hearing Officer found that the misrepresentation occurred only 2 days before the election, thereby giving the Union little or no opportunity to reply.⁶ He therefore concluded that the misrepresentation warranted setting aside the election.

In our recent decision in *Midland National Life Insurance Company*,⁷ we decided that we would return to the rule announced in *Shopping Kart Food Market, Inc.*,⁸ and therefore we would no longer set aside elections on the basis of misleading campaign statements.⁹ Thus, since the Employer's statements herein do not, in our view, amount to anything more than misleading campaign statements, they do not warrant setting aside the election under *Midland National*.¹⁰ Accordingly, we hereby overrule Objection 2 in its entirety. Further, since the tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for United Food and Commercial Workers International Union, Local No. 663, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees in the unit herein involved within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 40 for, and 47 against, the Petitioner; there were 6 challenged ballots, an insufficient number to affect the results.

² The Employer excepts to certain credibility findings made by the Hearing Officer. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Connor Trading Company, Inc.*, 188 NLRB 263, fn. 4 (1972); *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961). We find no sufficient basis for disturbing the credibility resolutions in this case.

³ In the absence of exceptions thereto, we adopt, *pro forma*, the Hearing Officer's recommendation that Objection 1 and the remaining portions of Objection 2 be overruled.

⁴ It appears that the Employer had engaged in joint negotiations with Safeway in the past involving one of the Employer's organized stores.

⁵ 140 NLRB 211 (1962).

⁶ We note that the Employer's statements were made 3 days before the election; however, in view of our decision herein the fact that Petitioner had 3 days rather than 2 in which to reply is immaterial.

⁷ 263 NLRB 127 (1982).

⁸ 228 NLRB 1311 (1977).

⁹ As we stated in *Midland National*, *supra*, we will continue to intervene in cases where a party has used forged documents which render the voters unable to recognize the propaganda for what it is and to protect employees against other campaign conduct, such as threats, promises, or the like, that interferes with employee free choice. In this case, we find no basis for concluding that Weaver's statements amounted to a threat or conduct which otherwise interfered with employee free choice.

¹⁰ We note that *Midland National*, *supra*, involved a misrepresentation of fact, whereas the instant case involves a misrepresentation of law. However, *Midland National* applied to misleading campaign statements generally, and there is no basis for treating misrepresentations of law differently than any other misrepresentations. See also *Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital*, 264 NLRB 1094 (1982).

For the reasons stated in his dissenting opinions in *Midland National* and *Riveredge Hospital*, Member Fanning would adopt the Hearing Officer's sustaining of parts of Objection 2.